

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on January 8, 2007. (Ct. Rec. 15, 17). Plaintiff Gary L. Varnam ("Plaintiff") filed a reply on December 29, 2006. (Ct. Rec. 19). Attorney Thomas Bothwell represents Plaintiff; Special Assistant United States Attorney David M. Blume represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a

<sup>1</sup>As of February 12, 2007, Michael J. Astrue succeeded Commissioner Linda S. McMahon as acting Commissioner of Social Security. Pursuant to E.D. R. CIV. P. 25(d)(1), Commissioner Michael J. Astrue should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

1 magistrate judge. (Ct. Rec. 2). After reviewing the administrative  
2 record and the briefs filed by the parties, the court **GRANTS**  
3 Defendant's Motion for Summary Judgment (Ct. Rec. 17) and **DENIES**  
4 Plaintiff's Motion for Summary Judgment (Ct. Rec. 15).

5 **JURISDICTION**

6 On July 23, 2003, Plaintiff protectively filed an application  
7 for Disability Insurance Benefits ("DIB"), alleging disability since  
8 June 30, 2003, due to post-traumatic stress disorder ("PTSD"). (Tr.  
9 52, 53, 65.) The application was denied initially and on  
10 reconsideration. (Tr. 30-32, 35-36.)

11 On July 22, 2004, Plaintiff appeared and testified before  
12 Administrative Law Judge ("ALJ") Verrell Dethloff. (Tr. 355-372.)  
13 On January 26, 2005, the ALJ issued a decision finding that  
14 Plaintiff was not disabled. (Tr. 15-27.) The Appeals Council denied  
15 a request for review on December 5, 2005. (Tr. 7-9.) Therefore, the  
16 ALJ's decision became the final decision of the Commissioner, which  
17 is appealable to the district court pursuant to 42 U.S.C. § 405(g).  
18 On February 3, 2006, Plaintiff filed this action for judicial review  
19 pursuant to 42 U.S.C. § 405(g). (Ct. Rec. 1.)

20 **STATEMENT OF FACTS**

21 The facts have been presented in the administrative hearing  
22 transcript, the ALJ's decision, the briefs of both Plaintiff and the  
23 Commissioner and will only be summarized here. Plaintiff was 55  
24 years old on the date of the decision and has a ninth grade  
25 education. He served in Vietnam as a Marine from April 16, 1969, to  
26 October 14, 1970. (Tr. 19, 71, 53.)

27 Plaintiff worked delivering newspapers for the Yakima Herald  
28 from 1994 through June of 2003, delivering newspapers for the

1 Ellensburg Daily Record from 2000 to 2003, and ran his own lawn care  
2 business from December of 1993 until December of 2000. (Tr. 66, 71,  
3 296, 361-362.) At the administrative hearing held on July 22, 2004,  
4 Plaintiff testified that he last worked on June 30, 2003, delivering  
5 newspapers. (Tr. 360, 367.) Plaintiff stopped because he "got  
6 tired of doing it, and things were bothering me, and, and I was  
7 getting irritated more and more about things and stuff, so I just  
8 quit." (Tr. 360.)

9 Plaintiff testified that he lives with his spouse in a house on  
10 five acres. (Tr. 362-363.) He watches television, reads, works on  
11 his four cars, and occasionally drives his spouse to Ellensburg to  
12 shop or pay bills. (Tr. 363, 366.) The work on Plaintiff's cars  
13 consists of changing the oil, performing tune ups, and changing  
14 tires. (Tr. 366.) Plaintiff testified that his prescription  
15 medication seems to help keep him calmer, and eventually he will go  
16 into counseling. (Tr. 363-365.) At times Plaintiff is tired, run  
17 down, and doesn't feel like getting up and doing anything. (Tr.  
18 367.)

19 **SEQUENTIAL EVALUATION PROCESS**

20 The Social Security Act (the "Act") defines "disability" as the  
21 "inability to engage in any substantial gainful activity by reason  
22 of any medically determinable physical or mental impairment which  
23 can be expected to result in death or which has lasted or can be  
24 expected to last for a continuous period of not less than twelve  
25 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
26 provides that a Plaintiff shall be determined to be under a  
27 disability only if his impairments are of such severity that  
28 Plaintiff is not only unable to do his previous work but cannot,

1 considering Plaintiff's age, education and work experiences, engage  
2 in any other substantial gainful work which exists in the national  
3 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the  
4 definition of disability consists of both medical and vocational  
5 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir.  
6 2001).

7 The Commissioner has established a five-step sequential  
8 evaluation process for determining whether a person is disabled. 20  
9 C.F.R. §§ 404.1520, 416.920. Step one determines if he is engaged  
10 in substantial gainful activities. If he is, benefits are denied.  
11 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If he is not, the  
12 decision maker proceeds to step two, which determines whether  
13 Plaintiff has a medically severe impairment or combination of  
14 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

15 If Plaintiff does not have a severe impairment or combination  
16 of impairments, the disability claim is denied. If the impairment  
17 is severe, the evaluation proceeds to the third step, which compares  
18 Plaintiff's impairment with a number of listed impairments  
19 acknowledged by the Commissioner to be so severe as to preclude  
20 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
21 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App. 1. If the  
22 impairment meets or equals one of the listed impairments, Plaintiff  
23 is conclusively presumed to be disabled. If the impairment is not  
24 one conclusively presumed to be disabling, the evaluation proceeds  
25 to the fourth step, which determines whether the impairment prevents  
26 Plaintiff from performing work he has performed in the past. If  
27 Plaintiff is able to perform his previous work, he is not disabled.  
28 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step,

1 Plaintiff's residual functional capacity ("RFC") assessment is  
 2 considered. If Plaintiff cannot perform this work, the fifth and  
 3 final step in the process determines whether Plaintiff is able to  
 4 perform other work in the national economy in view of his residual  
 5 functional capacity and his age, education and past work experience.  
 6 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
 7 482 U.S. 137 (1987).

8 The initial burden of proof rests upon Plaintiff to establish  
 9 a *prima facie* case of entitlement to disability benefits. *Rhinehart*  
 10 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172  
 11 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once  
 12 Plaintiff establishes that a physical or mental impairment prevents  
 13 him from engaging in his previous occupation. The burden then  
 14 shifts, at step five, to the Commissioner to show that (1) Plaintiff  
 15 can perform other substantial gainful activity, and (2) a  
 16 "significant number of jobs exist in the national economy" which  
 17 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
 18 Cir. 1984).

19 **STANDARD OF REVIEW**

20 Congress has provided a limited scope of judicial review of a  
 21 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
 22 the Commissioner's decision, made through an ALJ, when the  
 23 determination is not based on legal error and is supported by  
 24 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
 25 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
 26 "The [Commissioner's] determination that a plaintiff is not disabled  
 27 will be upheld if the findings of fact are supported by substantial  
 28 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)

1 (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a  
 2 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup>  
 3 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
 4 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of*  
 5 *Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988).  
 6 Substantial evidence "means such evidence as a reasonable mind might  
 7 accept as adequate to support a conclusion." *Richardson v. Perales*,  
 8 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences  
 9 and conclusions as the [Commissioner] may reasonably draw from the  
 10 evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289,  
 11 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as  
 12 a whole, not just the evidence supporting the decision of the  
 13 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)  
 14 (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

15 It is the role of the trier of fact, not this Court, to resolve  
 16 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 17 supports more than one rational interpretation, the Court may not  
 18 substitute its judgment for that of the Commissioner. *Tackett*, 180  
 19 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
 20 Nevertheless, a decision supported by substantial evidence will  
 21 still be set aside if the proper legal standards were not applied in  
 22 weighing the evidence and making the decision. *Brawner v. Secretary*  
 23 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987).  
 24 Thus, if there is substantial evidence to support the administrative  
 25 findings, or if there is conflicting evidence that will support a  
 26 finding of either disability or nondisability, the finding of the  
 27 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
 28 1230 (9<sup>th</sup> Cir. 1987).

## **ALJ'S FINDINGS**

At the outset the ALJ found that Plaintiff meets the nondisability requirements of Section 216(I) of the Social Security Act and is insured for DIB through the date of the decision. (Tr. 19.) The ALJ found at step one that Plaintiff has not engaged in substantial gainful activity since the alleged onset date, June 30, 2003. (Tr. 19.) At steps two and three, the ALJ determined that Plaintiff suffers from the severe impairment of post-traumatic stress disorder (PTSD), but the impairment does not meet or medically equal one of the Listings impairments. (Tr. 19, 21-22.) The ALJ found that Plaintiff's sleep apnea is controlled with medication and is therefore non-severe. (Tr. 24.) At step three, the ALJ found that Plaintiff has the residual functional capacity to perform work at all exertion levels, with the following limitations: (1) because he is moderately limited in the ability to work in coordination with or proximity to others without being distracted by them, Plaintiff should have limited contact with the general public and coworkers; and (2) Plaintiff should avoid concentrated exposures to hazards such as machinery or heights. (Tr. 23, 27.) At step four of the sequential evaluation process, the ALJ found that with this RFC, Plaintiff is able to perform his past relevant work delivering newspapers. (Tr. 27.) Because the ALJ determined at step four of the sequential evaluation process that Plaintiff was not disabled within the meaning of the Social Security Act, he was not required to proceed to step five. (Tr. 27.)

## ISSUE

Plaintiff raises a single issue: the Commissioner erred as a matter of law by failing to properly credit the VA's disability

1 determination. (Ct. Rec. 15-2 at 1, 14-18.) The Commissioner  
2 responds that the ALJ properly weighed the medical evidence. (Ct.  
3 Rec. 18 at 6-11.)

4 This court must uphold the Commissioner's determination that  
5 Plaintiff is not disabled if the Commissioner applied the proper  
6 legal standards and there is substantial evidence in the record as  
7 a whole to support the decision.

8 **DISCUSSION**

9 In social security proceedings, the claimant must prove the  
10 existence of a physical or mental impairment by providing medical  
11 evidence consisting of signs, symptoms, and laboratory findings; the  
12 claimant's own statement of symptoms alone will not suffice. 20  
13 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
14 the basis of a medically determinable impairment which can be shown  
15 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical  
16 evidence of an underlying impairment has been shown, medical  
17 findings are not required to support the alleged severity of  
18 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991).

19 A treating or examining physician's opinion is given more  
20 weight than that of a non-examining physician. *Benecke v. Barnhart*,  
21 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
22 physician's opinions are not contradicted, they can be rejected only  
23 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,  
24 830 (9<sup>th</sup> Cir. 1996). If contradicted, the ALJ may reject an opinion  
25 if he states specific, legitimate reasons that are supported by  
substantial evidence. See *Flaten v. Secretary of Health and Human  
Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995). In addition to medical  
26 reports in the record, the analysis and opinion of an non-examining  
27 28

1 medical expert selected by an ALJ may be helpful to the  
2 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995)  
3 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989).  
4 Testimony of a medical expert may serve as substantial evidence when  
5 supported by other evidence in the record. *Id.*

6 Plaintiff contends that the ALJ erred by failing to properly  
7 consider the VA's determination that Plaintiff was 70% disabled  
8 beginning in January of 2003 and 100% disabled beginning in July of  
9 2004. (Ct. Rec. 15-2 at 1, 14-18.) The Commissioner responds that,  
10 while the ALJ must ordinarily give great weight to the VA's rating,  
11 the VA and SSA criteria are not identical, and the ALJ may, as he  
12 did in this case, give less weight to the VA rating if he gives  
13 persuasive, specific and valid reasons that are supported by the  
14 record. (Ct. Rec. 18 at 7), citing *McCartey v. Massanari*, 298 F. 3d  
15 1072, 1076 (9<sup>th</sup> Cir. 2002).

16 The ALJ is not required to give great weight to a VA rating if  
17 the decision adequately explains the valid reasons for not doing so.  
18 *Id.* In this case the ALJ observed that both the VA's 70% and 100%  
19 disability determinations were apparently based on reports by Philip  
20 Plattner, M.D. (Tr. 24.) The ALJ gave the VA assessment little  
21 weight because: (1) Dr. Plattner's notes do not support complete  
22 disability; (2) there is no indication that Dr. Plattner has an  
23 ongoing treatment relationship with Plaintiff; (3) Dr. Plattner's  
24 analysis is "shallow"; (3) "unemployability" is not the standard for  
25 the Social Security Administration; (4) even while classified as  
26 significantly vocationally limited by the VA, the Plaintiff was  
27 earning substantial gainful activity, and (5) Dr. Plattner's notes  
28 from March 19, 2003 (Tr. 301-306) do not really differ from his more

1 thorough July 19, 1999, exam (Tr. 249-255) where he assessed a GAF  
2 of 55 to 60. (Tr. 24.)

3 Dr. Plattner first examined Plaintiff on July 19, 1999. (Tr.  
4 249-255.) He noted that Plaintiff's VA file contained a prior  
5 psychiatric evaluation by C. Richard Johnson, M.D., from June 25,  
6 1986. (Tr. 249.) Dr. Johnson had noted that Plaintiff was having  
7 difficulty remembering things and reported that he occasionally gets  
8 "touchy." (Tr. 249.) Dr. Johnson found "no psychiatric disease or  
9 disorder." (Tr. 249.)

10 At the 1999 exam, Plaintiff told Dr. Plattner about some of his  
11 combat experiences in Vietnam. He said that "once in a while" he had  
12 disturbing memories of the experience. (Tr. 249-251.) Plaintiff has  
13 "cold sweats" from 15 to 20 nights a month, and has had these for  
14 many years. (Tr. 251.) He dislikes large groups of people. (Tr.  
15 251.) Plaintiff described feelings of estrangement and detachment  
16 from others, a "long standing difficulty with sleep disturbance,"  
17 and being startled by sudden loud noises. Plaintiff told Dr.  
18 Plattner that he has problems with anger and irritability. (Tr.  
19 251.) Dr. Plattner observed that Plaintiff "shows a restriction to  
20 his range of affect," and "has significant problems in concentrating  
21 and focusing on the task at hand within the psychiatric evaluation."  
22 (Tr. 251.) Plaintiff told Dr. Plattner that he worked delivering  
23 newspapers, mowing lawns and performing odd jobs such as removing  
24 snow and making minor plumbing repairs, and his net income from this  
25 work was \$8,000 to \$11,000 a year. (Tr. 252-253.) Dr. Plattner  
26 observed that Plaintiff "has a very significant numbing of his  
27 general responsiveness that is evident within the psychiatric  
28 evaluation." (Tr. 254.) He opined that Plaintiff met the full

1 criteria for PTSD; he diagnosed PTSD, chronic, of at least moderate  
2 severity, and assessed a current GAF of 55 to 60. (Tr. 253-254.)  
3 This assessment from 1999 predates Plaintiff's June 2003 onset date  
4 by about four years.

5 Dr. Plattner's next evaluation took place on March 19, 2003,  
6 eight months after the alleged onset date. (Tr. 301.) Dr. Plattner  
7 noted that Plaintiff was seeking an increase in his service-  
8 connected disability for PTSD "as he indicates that his condition  
9 has worsened." (Tr. 301.) Plaintiff described having more  
10 difficulty with anger and irritability and significant agitation  
11 caused by sudden loud noises. (Tr. 302.) Plaintiff's spouse  
12 indicated that "he is neglecting his personal appearance and  
13 hygiene," and he began seeing a counselor only last week. (Tr.  
14 302.) Plaintiff told Dr. Plattner that he stopped his yard work  
15 business one and a half to two years earlier because he was getting  
16 too angry and irritable; he also quit one of his paper delivery  
17 routes but was still delivering two routes at the time of the exam.  
18 (Tr. 302.) Plaintiff described ongoing frequent disturbing memories  
19 about his military service, some of them triggered by planes and  
20 helicopters flying overhead. (Tr. 302.) He told Dr. Plattner that  
21 he does not have nightmares but experiences night sweats two to  
22 three times a week. (Tr. 303.) Dr. Plattner assessed PTSD, chronic  
23 and severe; dysthymia secondary to PTSD, chronic and at least  
24 moderately severe, possibly of greater severity, and noted that  
25 Plaintiff recently began antidepressant medication. (Tr. 305.) Dr.  
26 Plattner opined that Plaintiff's occupational impairment is severe.  
27 In reaching this conclusion, Dr. Plattner noted that Plaintiff gave  
28 up his yard work business and reported earning only \$4,000 the

1 previous year. (Tr. 305.) With respect to employability, Dr.  
 2 Plattner opined: "It is not thought that the veteran would be able  
 3 to gain or sustain competitive full time employment. He can only  
 4 work part time, in relative isolation and detachment from others,  
 5 which he does with his paper route." Dr. Plattner assessed a GAF of  
 6 50. (Tr. 305-306.)

7 Jay Toews, Ed.D., examined Plaintiff on October 1, 2003, four  
 8 months after the alleged onset date and seven months after Dr.  
 9 Plattner's last exam. (Tr. 175-178.) Plaintiff was not in  
 10 counseling. (Tr. 175.) He took Prozac for two years, and reported  
 11 that it helped him sleep better and feel much less agitated. (Tr.  
 12 175.) Plaintiff told Dr. Toews that he performs routine maintenance  
 13 and repairs on his house, his vehicles, and on small engines. He has  
 14 a few friends that he sees on a regular basis. Plaintiff gets up at  
 15 8:00 a.m., goes to bed between 1:00 and 4:00 a.m., and sleeps four  
 16 hours a night. (Tr. 176.) Dr. Toews felt that "this seems quite  
 17 improbable." (Tr. 176.) Dr. Toews found no indication of cognitive  
 18 deficits and no problems with attention or concentration. (Tr.  
 19 177.) Plaintiff was able to comprehend detailed instructions and  
 20 his memory was intact. He reported no history of antisocial  
 21 behavior. (Tr. 177.) Dr. Toews observed that Plaintiff's mood was  
 22 neutral and his affect mildly constricted. (Tr. 177.) Dr. Toews  
 23 opined:

24 This gentleman is uncharacteristically vague referencing  
 25 his symptoms and problems. He appears to be poorly  
 26 motivated and to have had little work motivation. His  
 27 overall demeanor was not congruent with either depression  
 or anxiety. References to intrusions were unconvincing. If  
 indeed this gentleman has PTSD, it is extremely mild and  
 does not appear to interfere in any significant way.

28 (Tr. 177.) Dr. Toews diagnosed "PTSD by history, vague symptomology,

1 and learning disorder, NOS by history, and rule out borderline  
 2 intellectual functioning." He assessed a GAF of 65-70. (Tr. 178.)

3 The ALJ considered credibility when he weighed the medical  
 4 evidence, and determined that Plaintiff was not entirely credible.  
 5 (Tr. 22.) Plaintiff does not challenge this finding. When a  
 6 claimant does not seriously challenge the ALJ's credibility  
 7 determination, medical opinions based primarily on plaintiff's  
 8 subjective complaints are entitled to less weight. *Tonapetyan v.*  
 9 *Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001) (a physician's opinion  
 10 may be disregarded when it is premised on the properly rejected  
 11 subjective complaints of plaintiff).

12 It is the province of the ALJ to make credibility  
 13 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
 14 1995). However, the ALJ's findings must be supported by specific  
 15 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
 16 1990). Once the claimant produces medical evidence of an underlying  
 17 impairment, the ALJ may not discredit the testimony as to the  
 18 severity of an impairment because it is unsupported by medical  
 19 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998).  
 20 Absent affirmative evidence of malingering, the ALJ's reasons for  
 21 rejecting the claimant's testimony must be "clear and convincing."  
 22 *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General  
 23 findings are insufficient: rather the ALJ must identify what  
 24 testimony is not credible and what evidence undermines the  
 25 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,  
 26 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

27 The ALJ found Plaintiff less than fully credible for at least  
 28 three reasons: (1) Plaintiff worked for years (from at least 1999 to

1 June of 2003) with the same symptoms as those he described at the  
2 hearing; therefore, the symptoms cannot be disabling, as Plaintiff  
3 alleges; (2) Plaintiff's alleged worsening of psychological symptoms  
4 is not corroborated by any medical evidence in the record; the only  
5 evidence of a worsening condition is provided by Plaintiff's spouse  
6 and by Dr. Plattner's conclusion, and (3) Plaintiff's activities of  
7 daily living are incompatible with the claimed degree of impairment.  
8 (Tr. 22-23.)

9 The ALJ found that Plaintiff worked for several years with the  
10 same symptoms as those currently alleged; and he observed that  
11 working with an impairment supports a conclusion it is not  
12 disabling. (Tr. 23, citing *Drouin v. Sullivan*, 966 F.2d 1255, 1258  
13 (9<sup>th</sup> Cir. 1992); *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 601  
14 (9<sup>th</sup> Cir. 1999.)) The ALJ is correct: the record reflects that when  
15 Plaintiff first saw Dr. Plattner in 1999 (four years before onset),  
16 he reported episodic disturbing recollections of his Vietnam  
17 experience, disturbed sleep, a startle response to loud noises, and  
18 said that he disliked crowds. Dr. Plattner opined that Plaintiff  
19 showed problems with concentration and focus during the exam. The  
20 VA assessed 70% disability. (Tr. 250-252.) Forms Plaintiff  
21 completed state that he worked from January of 1994 to June of 2003  
22 delivering newspapers in Yakima, and earned \$1,100 monthly. (Tr.  
23 66.) From December of 1993 to December of 2000, Plaintiff operated  
24 his own lawn care business and earned \$1,000 monthly. (Tr. 66.)  
25 Plaintiff delivered papers on two routes for another newspaper, the  
26 Daily Record, from November of 2000 through June of 2003. He earned  
27 \$600 for one route and \$1,900 for another. (Tr. 66.) The DIB insured  
28 status report lists Plaintiff's 2002 income as \$8,479.00, which, as

1 the ALJ notes, is at or near SGA levels.<sup>2</sup> (Tr. 24, 63.) The ALJ is  
 2 correct that Plaintiff's demonstrated ability to work with his  
 3 alleged mental impairments supports a conclusion that the  
 4 impairments are not disabling.

5 The ALJ found that although Plaintiff told Dr. Plattner his  
 6 PTSD symptoms had worsened, there is nothing in the record to  
 7 support this other than his spouse's statements and Dr. Plattner's  
 8 conclusion. (Tr. 23.) The ALJ notes that despite Dr. Plattner's  
 9 diagnosis of severe impairment in March of 2003, Plaintiff continued  
 10 to work for three months after the exam and did not stop working or  
 11 allege disability until June of 2003. (Tr. 20.) The ALJ properly  
 12 relied on the lack of medical corroboration of a worsening  
 13 condition, together with Plaintiff's history of working at or near  
 14 SGA levels with the same symptoms, as weighing against Plaintiff's  
 15 credibility, particularly his March 2003 statement to Dr. Plattner  
 16 that his condition had worsened from 1999 to March of 2003. The ALJ  
 17 also points out that in 2004, Plaintiff was referred for mental  
 18 health treatment for his PTSD symptoms, but he refused treatment.  
 19 (Tr. 21, citing Exhibit 9F at Tr. 236.) The ALJ is correct that the  
 20 record does not support Plaintiff's claim or Dr. Plattner's opinion  
 21 that Plaintiff's mental condition had worsened by March of 2003.

22 The ALJ considered Plaintiff's daily activities when he  
 23 assessed credibility. He found that Plaintiff's activities show the  
 24 ability to engage in physical activities, as well as the ability to  
 25 concentrate, focus, and persist in order to follow directions. (Tr.  
 26 22.) The ALJ noted that Plaintiff is independent in his self-care,  
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28 <sup>2</sup> See 20 C.F.R. § 416.974.

1 has a full complement of independent living skills, performs routine  
2 maintenance on his residence, vehicles and small engines, drives  
3 (requiring a lot of concentration), has done heavy lifting, watches  
4 television, reads, plays games, visits friends, and goes out to  
5 dinner with his spouse. (Tr. 21-22.) The ALJ is correct that  
6 Plaintiff's activities, as reflected in the record, are inconsistent  
7 with the degree of impairment alleged.

8 The ALJ properly took into account Plaintiff's credibility and  
9 his lack of a treating relationship with Dr. Plattner when he  
10 assessed the doctor's opinion. (Tr. 24.) Dr. Plattner was an  
11 examining, not a treating physician. The record shows that he  
12 examined Plaintiff twice, about four years apart. The ALJ is correct  
13 that Dr. Plattner did not have an ongoing treatment relationship  
14 with Plaintiff, and correctly looked at the length of treatment as  
15 an appropriate factor to consider when weighing the doctor's  
16 opinion. (Tr. 20, 24-25.)

17 When the ALJ weighed the VA's assessment, perhaps most  
18 significant is that relevant facts were not known to the VA when  
19 they found Plaintiff disabled. The ALJ points out that "even while  
20 classified as significantly vocationally limited by the VA the  
21 claimant was in fact earning substantial gainful activity." (Tr.  
22.) Plaintiff told Dr. Plattner in 2003 that in the past year he  
23 earned \$4,000. (Tr. 163.) Dr. Plattner relied at least in part on  
24 this statement in assessing Plaintiff's occupational impairment,  
25 because he stated: "The veteran makes less money at this point as he  
26 gave up his yard work job and reports only making \$4,000 last year.  
27 He indeed does have severe occupational impairment given the level  
28 of severity of his posttraumatic stress disorder and associated

1 depressive difficulties." (Tr. 164.) However, as the ALJ points out,  
 2 the record reflects that Plaintiff earned about \$8,000, not \$4,000,  
 3 in 2002. (Tr. 23, 63, 361.) The VA's disability determination  
 4 appears to be based on Dr. Plattner's evaluation; the ALJ properly  
 5 considered that Dr. Plattner's opinion was based, at least  
 6 partially, on incorrect information.

7 The ALJ relied on plaintiff's ability to work, even after Dr.  
 8 Plattner's 2003 assessment; Dr. Plattner's lack of a treating  
 9 relationship; the incorrect information which partially formed the  
 10 basis of Dr. Plattner's assessment, and the lack of medical and  
 11 other evidence of impaired mental functioning, when he weighed the  
 12 VA's determination. (Tr. 25-26.) All are persuasive, specific and  
 13 valid reasons for the ALJ to give less weight to the VA's disability  
 14 determination. See *McCartey v. Massanari*, 298 F.3d at 1076 (9<sup>th</sup> Cir.  
 15 2002).

16 **CONCLUSION**

17 Having reviewed the record and the ALJ's conclusions, this  
 18 court finds that the ALJ's decision that Plaintiff is capable of  
 19 performing his past relevant work delivering newspapers is supported  
 20 by substantial evidence and free of legal error. Plaintiff is thus  
 21 not disabled within the meaning of the Social Security Act.  
 22 Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is  
 25 **DENIED**.

26 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
 27 **GRANTED**.

28 3. The District Court Executive is directed to file this

1 Order, provide copies to counsel for Plaintiff and Defendant, enter  
2 judgment in favor of Defendant, and **CLOSE** this file.

3 DATED February 21, 2007.

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5 S/ CYNTHIA IMBROGNO  
6 UNITED STATES MAGISTRATE JUDGE

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